IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5122 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BARODA DISTRICT COOPERATIVE MILK PRODUCERS UNION LTD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 5122 of 2004

MR BS PATEL for Petitioner No. 1

MRS RANJAN B PATEL for Petitioner No. 1

..... for Respondent No. 1

MR RAJESH P MANKAD for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 29/04/2004

ORAL JUDGEMENT

Rule, Mr. M.R. Mengde, learned Assistant Government Pleader is directed to appear for respondent No.1. He appears and waives service of notice of rule on behalf of respondent No.1. Mr. Mankad appears for respondent No.2 and waives service of notice of rule on behalf of respondent No.2. With the consent of all parties, the matter is finally heard today.

2. The present petition is preferred by the petitioner for challenging the order dated 30th August 2003 passed by the respondent No.1 for referring the matter to the Industrial Tribunal for adjudication. The petitioner has also challenged the order dated 15.04.04 passed by the Industrial Tribunal below interim application in Reference [IT] No. 111 of 2003.

3. Heard Mr. Patel for the petitioner, Mr. Mengde, Assistant Government Pleader for the respondent No.1 and Mr. Mankad for respondent No.2.

4. It has been contended on behalf of the petitioner that the workmen on whose behalf the dispute was raised and which has been referred to by the Industrial Tribunal, are not the employees of the petitioner. It has been further submitted that the Reference is without any dispute between the petitioner and the respondent No.2 as there is no relationship of employer and employee. Mr. Patel also submitted that since there is no relationship of employer and employee between the petitioner and the workmen concerned, and as they are employees of the Contractor, the Reference itself would not be competent, and the order passed by the respondent No.1 for referring the matter for adjudication is illegal. However, Mr. Patel submitted that if the Reference is decided within a stipulated time limit, the petitioner would not press for such a challenge against the order for making Reference, and the issue of maintainability of the Reference may be considered at the time of final decision of the Reference. The learned advocates for both the sides, manely employer and the workmen, have assured that they shall co-operate with hearing if any time bound direction is given.

5. So far as challenge to the order passed by the Tribunal below interim application is concerned, it has been submitted on behalf of the petitioner that as the workmen concerned are employees of the Contractor, if such a direction is allowed to operate, the consequences would be that the petitioner will not be able to give contract to any other Contractor, as the present contract is to expire tomorrow. It has also been submitted on

behalf of the petitioner that if all the workmen are to be continued by offering employment, may be by new contractor, then no contractor would agree for the terms as may be convenient to the petitioner, and, therefore, such direction which is ordered by the Tribunal cannot be maintained. Mr. Patel also submitted that since there is no relationship of employer and employee and the workmen concerned are the employees of the contractor, the Tribunal could not have passed such an interim order and operation of such interim order would create great hardship to the petitioner.

6. On behalf of the respondent No.2, Mr. Mankad submitted interalia that the workmen concerned are in employment of the petitioner since 1997 and in the year 2001, they are shown as employees of the contractor. He submitted that the workmen concerned are as such the employees of the petitioner, and not of the contractor. He further submitted that the Tribunal has ordered for continuation of the employment by maintaining the continuity of service, and, in the submission of Mr. Mankad, the order is an interim order, which does not call for any interference.

7. Having considered the rival contentions, if the main Reference is considered, the same pertains for confirming permanency benefit on completion of 240 days. It is true that as per the petitioner, the workmen concerned are the employees of the Contractor whereas the case of the workmen is that they are the employees of the petitioner Dairy. Whether the workman are the employees of the petitioner Dairy or they are the employees of the Contractor would be a question which will be considered by the Tribunal after recording of the evidence. However, until it is fully established that either the workmen concerned are the employees of the petitioner Dairy or the contract is sham or bogus, at the most the workman would be entitled to the employment because if the termination is effected, the same would prejudice the Reference itself. At the same time, if the contract is to be changed, the petitioner or the new contractor should be at liberty to revise the wages subject to the rider that no payment is less than the minimum wages prescribed because ensuring payment of minimum wages shall also be the duty of the principal employer, even if the contention of the employer is accepted for the present that the workman concerned are the employees of the contractor.

8. The Tribunal, in my view, has passed a wider order which may create a stalemate. There is no

reference to the effect that the contract is sham or bogus. The only scope of reference is that whether the workman would be entitled to permanency benefit on completion of 240 days. The Tribunal has also not recorded a clear finding that the workmen concerned are not the employees of the Contractor. The passing of the interim order and the language employed by the Tribunal shows that the Tribunal has also proceeded on the basis that the workmen are the employees of the contractor. Ultimately, as an outcome of the Reference, after adjudication, the respondent No. 2 may prove that they are as such the employees of the petitioner and not of the Contractor concerned, but until the said aspect is finalised, at the most, the respondent No. 2 would be entitled to the protection to the extent of continuing the work with a condition that they are entitled to payment not less than minimum wages. Since the new contract is yet not finalised and other terms and conditions of the contract are also yet not finalised, it may be that on account of the revision in the amount of contract, the new contractor may continue the engagement of the workmen concerned but the wages may be revised. However, the petitioner being the principal employer, has to ensure that payment of wages is not less than the minimum wages prescribed. It is not the case of the petitioner, at this stage, that the new contractor may be required to engage less number of workers and such aspects can be finalised only after the contract is given and various terms and conditions of the contract are put to him. In case of such contingency, if the contract is awarded, appropriate relief can be considered at that stage, but for the present, on such hypothesis, the prayer for allowing the reduction of the number of workmen on account of new contract cannot be entertained at this stage. It may be mentioned that Mr. Patel for the petitioner at that stage submitted that under such contingency, liberty may be reserved to the contractor to move appropriate application to the Tribunal.

9. In view of the above, I find that the following directions shall meet with the ends of justice:

[i]. The order dated 15.4.2004 passed by the Industrial Tribunal below exh. 10 in Reference [IT] No. 111/03 shall stand modified to the extent that the interim injunction shall continue qua termination, and as a consequence thereof, the employment of the workmen concerned may be through new contractor, shall be continued, and it would be open to the petitioner either directly or through the new contractor to revise

the wages of the workmen in the light of revision in the terms and conditions of the contract, but such payment of wages shall not be less than the minimum wages prescribed.

[ii]. It is clarified that in case if as an outcome of fresh terms and conditions of the new contract, the number of workmen are to be reduced, then under such circumstance, it would be open for the petitioner or the new contractor, as the case may be, to move appropriate application before the Tribunal for such purpose, and if and when such application is made, it would be open to the workmen concerned to oppose the same, and the Tribunal shall decide the same in accordance with law, after hearing all concerned.

[iii]. The question regarding maintainability of the Reference shall be decided at the time of final disposal of the Reference.

[iv]. Considering the facts and circumstances of the case, the Tribunal shall make all attempts to dispose of the Reference as early as possible, preferably within a period of six months from the date of receipt of the writ of this Court.

10. The petition is partly allowed to the aforesaid extent and rule made absolute accordingly. Considering the facts and circumstances of the case, no order as to costs.

[JAYANT PATEL, J.]

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